Counsel for the Third Party submitted that the burden is on the defendants to prove that they have strictly complied with the terms of the letter of indemnity and it cannot be doubted that this is a correct proposition of law. On this point, in view of the conclusions which I have reached, it is clear, in my judgment, that the defendants have proved that they have done all that they were required to do under the contract of indemnity. It follows, therefore, that in the events which have happened, the defendants are entitled to enforce their claim against the Third Party.

There is one further observation which remains to be made on this case. In the Court below, counsel for the defendants contended that the description and particulars of the goods set out in the letter of indemnity should be ignored and that the document should be construed as if it merely related to 79 packages without any indication of their contents. This proposition, which, as the learned trial Judge said in his judgment, was quite untenable, was not put forward before this Court. Counsel for the defendants expressly stated in this Court that he did not wish to pursue that line of argument; instead, he contended that the evidence led to the conclusion that the goods described item by item in the letter of indemnity were in fact delivered to Ban Hoe Co. As I have already indicated, this contention is in my opinion well-founded, but in view of the manner in which the case was argued in the Court below, it can well be understood why it was not dealt with by the learned trial Judge in his judgment.

For the reasons which I have stated I am of opinion that the appeal should be allowed with costs.

Appeal allowed.

Solicitors: *Drew & Napier, Donaldson & Burkinshaw.*

TEO THIN CHAN & ANOR. v. PUBLIC PROSECUTOR

[A. Cr. J. (Smith J.) July 2, 1957]

[K. L. — Criminal Appeal No. 19 of 1957]

Trial — Assault — Complainant's evidence — No certified copy of first report — Evidence Ordinance, 1950, s. 114(g).

This appeal arose out of a private summons case for assault. The evidence produced at the trial was that of the complainant herself and her mother who was very much an interested party. No certified copy of the first report which the complainant made to the police very shortly after the alleged assault was produced at the trial.

Held: (1) in this case it was necessary for the complainant to support her evidence with that of the first report;

(2) as the first report was not produced at the close of the prosecution case, the Magistrate should not have called upon the appellants for their defence.

Case referred to:—

(1) *Chin Khing Siong v. R.* (1952) M.L.J. 74.

MAGISTRATE'S CRIMINAL APPEAL.

D. G. Rawson for the appellants.

K. Chelvanayagam for the respondent.

Smith J. : — This was a private summons. At the trial the evidence of the complainant consisted of herself and her mother who was very much an interested party. The alleged assault took place in August 1956, and a report was made about that time to the police. In December, 1956, a complaint was made to the Magistrate and the case was heard before the learned Magistrate on the 29th January, 1957. At the trial the complainant failed to produce a certified copy of the report which she made to the police in August, 1956, very shortly after the alleged assault.

I agree with learned counsel for the appellants that the rule in *Chin Khing Siong v. R.*[1], applies to the facts of this case. In that case the evidence for the prosecution consisted solely of that of the complainant and Spenser-Wilkinson J., held that if the prosecution failed to produce the first report to corroborate the testimony of the complainant (which is possible under section 157 of the Evidence Ordinance) then the presumption arises under section 114(g) of the Evidence Ordinance that that report which could have been and had not been produced would, if produced, have been unfavourable to the complainant.

In this case the complainant is not the only witness; she is supported by the evidence of her mother. The mother, however, was very far from being an independent witness and for this reason I consider that it was necessary for the complainant to support her evidence with that of the first report. This first report not having been produced at the close of the prosecution case, the learned Magistrate should not have called upon the two appellants for their defence. I accordingly reversed the finding and sentence and acquitted the appellants.

Appeal allowed.

Solicitors: *Shearn, Delamore & Co.; K. Chelvanayagam.*